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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL and the PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Second Circuit

NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, AMERICAN RESORT & RESIDENTIAL DEVELOPMENT ASSOCIATION AND NATIONAL REALTY COMMITTEE MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF IN SUPPORT OF THE PETITION

WILLIAM H. ETHIER
NATIONAL HOUSING CENTER
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

Counsel for Amici

December 20, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, AMERICAN RESORT & RESIDENTIAL DEVELOPMENT ASSOCIATION AND NATIONAL REALTY COMMITTEE FOR LEAVE TO FILE THE ATTACHED BRIEF *AMICI CURIAE*

The above named trade associations respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of Petitioners.

The Associations have received written consent from petitioners, respondent United States and intervenor-appellants below, Joseph Robichaud and Citizens in Sup-

port of Attleboro Mall,[1] to file the brief and have filed their letters of consent with the Clerk of the Court. Intervenor-appellees below, environmental groups listed in the Certificate of Service filed with the Clerk, have declined to grant consent.

The National Association of Home Builders (NAHB) represents 155,000 builders and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land planners, land developers and remodelers. It is the voice of the American shelter industry.

The National Association of Industrial and Office Parks (NAIOP) is a professional organization of more than 7,000 individuals engaged in owning, managing and developing office and industrial buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers but also architects, brokers, master planners, engineers, property managers, banks, insurance companies and other real estate financial groups.

The International Council of Shopping Centers (ICSC) is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 27,000 members, and

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[1] The intervenor-appellants below have also filed a petition for writ of certiorari with this Court to review the Second Circuit's opinion. *Joseph Robichaud and Citizens in Support of Attleboro Mall v. United States Environmental Protection Agency, et al.*, 88-929. They raise a separate statutory construction issue not addressed by the petitioners, Bersani, et al., or these *amici*.

the approximately 25,000 located in the United States represent a majority of the shopping centers in this country. The ICSC is the only United States trade association specific to shopping centers.

The American Resort & Residential Development Association (ARRDA) is a trade association whose members consist of developers, operators and owners of resort and residential communities located throughout the United States. Firms that belong to ARRDA also include vacation exchange companies, lenders, consultants, attorneys and accountants who provide services to members and consumers. Each year, ARRDA's members, which include corporate and individually owned large and small businesses, serve millions of consumers in the United States and abroad by providing the varied leisure opportunities that families and individuals want and need in today's society.

The National Realty Committee (NRC) represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The members of these *amici* compete with one another within and among the five associations, vary in their operations and are highly diverse. They range from the small residential builder that may need to purchase only one tract of land per year to construct a few homes to the large, well capitalized company that can acquire and work on multiple tracts of land. They construct shelter for people in all walks of life, as well as the schools, churches, shopping centers, office buildings and other structures that are so vital to our communities.

These people and businesses are intimately involved in the federal government's wetlands protection program embodied in the Clean Water Act, 33 U.S.C. §1251, et seq. (1982), popularly known as the §404 program, and the implementation of the program's permitting guidelines, 40

C.F.R. §§ 230.1-230.80 (1987)(known as the §404(b)(1) guidelines). Since much land is affected by the §404 program, often they can not function without obtaining permits, which are authorized under §404, to place dredge or fill material into the "waters of the United States" or associated wetlands that come within the Clean Water Act's jurisdiction.

In applying its "practicable alternatives" analysis within the framework of the §404(b)(1) guidelines, the EPA's new "market entry" theory significantly and adversely impacts the land acquisition and finance processes in which these people and businesses routinely engage. Within this community of property owners, entrepreneurs and investors, EPA's unexpected market entry policy, which is nowhere found in any regulatory language, has caused a vast amount of confusion nationwide as to how to proceed with project ideas. The Second Circuit's confirmation of this new policy has engendered widespread dismay because of the opinion's complete lack of recognition, and even express rejection, of basic and real world project planning, land acquisition and finance principles.

These *amici* sincerely believe that the accompanying brief will greatly assist the Court because our concerns are much broader than those of petitioners. Petitioners focus their arguments on the illegality of EPA's market entry theory and the circumstances of their case, as important as it is. Our brief addresses public policy and land development issues not analyzed by petitioners, and relates those issues to the impracticality of EPA's new theory.

The protection of valuable wetlands is a laudable goal. But as with any other societal desire, its method of achievement should be informed, sound and rational. "Probably the biggest challenge facing the country is to make [wetlands protection] programs more effective while reducing the costs, delays, uncertainties, and frustrations they impose on wetlands owners, regulators and the many types of users." The Conservation Foundation, Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum 35 (1988). "Indeed,

the 'saga of Sweedens Swamp' heightened rather than resolved the very difficult issue of how we strike a reasonable balance between private land development interests and the admitted need to prevent unnecessary destruction of our valuable wetland resources." Liebesman, The 'Sweedens Swamp' Controversy - Focusing on EPA's Role in the Clean Water Act §404 Program, 9 Nat'l Wetlands Newsletter 15, 17 (Nov.-Dec. 1987)(Mr. Liebesman was lead federal counsel in the District Court below, *Bersani v. Environmental Protection Agency*, 674 F. Supp. 405 (N.D.N.Y. 1987).

The Clean Water Act balances the need to protect the quality of waters of the United States with society's need for economic growth and development. This Court has noted that where other values outweigh wetland values a permit can be issued. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985). The United States Army Corps of Engineers recognizes that "[t]he economic benefits of many projects [which require a §404 permit] are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values." 33 C.F.R. §320.4(q)(1987). But the EPA has relinquished any sense of duty to this crucial and difficult balancing test and the Second Circuit has failed to use its corrective powers, to the detriment of the members of these *amici* and of the whole nation.

For the above reasons, this Motion should be granted.

Respectfully submitted,

WILLIAM H. ETHIER
NATIONAL HOUSING CENTER
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

Counsel for Amici

December 20, 1988

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INTEREST OF THE AMICI CURIAE

The interest of *amici curiae* is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

A. Wetland Boundaries And The Section 404 Process

These *amici* adopt the Statement of the Case in the petition filed by Bersani, et al. However, to fully comprehend the mass confusion and unpredictability caused by EPA's new market entry theory and the Second Circuit's "rationale" supporting EPA, it is important to go beyond

the alternatives analysis and understand the practical application of the §404 program. These related §404 program issues, which the regulated community faces on a daily basis, highlight why the market entry theory is arbitrary, unreasonable and impracticable.

In the *Bersani* case, the alternative site wrongly identified by the EPA as available to and feasible for Pyramid Companies, the North Attleboro site, was clearly upland. *Bersani v. Robichaud*, 850 F.2d 36, 41 (2d Cir. 1988). This situation is an anomaly. In most cases, a property owner does not know if a particular site or potential alternative sites have wetlands or, if there are obvious wetlands, what the upland limits of any wetlands may be. See *National Wildlife Federation v. Hanson*, 623 F.Supp. 1539, 1546 (E.D.N.C. 1985); Pet. for Cert. at 16; Accord, Parrish & Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43, 46-47, 59-60 (1982).

If property owners suspect that there are covered wetlands on a site, they must hire a wetland scientist to perform a wetland boundary study and submit this data to the Corps and possibly the EPA for a formal jurisdictional determination. A jurisdictional determination is the process by which the federal government determines the actual boundary of the wetlands or waters of the United States covered by their regulatory jurisdiction. However, the Corps and EPA have failed to articulate a uniform method by which a property owner can know whether its property contains covered wetlands. The Corps and EPA have agreed on a "definition" of wetlands,[1] but that definition leaves so many questions unanswered that it does not much advance matters in terms of providing an individual a useful and knowable guide to the conduct of its

[1] Wetlands consist of "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. §328.3(b) (1987); 40 C.F.R. §230.41(a)(1) (1987).

affairs. For example, the regulatory "definition" does not define key terms such as "inundated or saturated," "frequency and duration," "normal circumstances" and "prevalence of vegetation." Even EPA recognizes the extreme difficulty of discerning a wetland, stating that the margins of wetlands "can best be established by specialists." 40 C.F.R. §230.41(a)(2)(1987).

The property owner's uncertainty only begins with the definition. The National Wetlands Policy Forum stated:

> Another source of inconsistency is the difficulty of applying a wetlands definition to an on-the-ground determination of a regulatory boundary. . . . Different individuals or agencies may also use different boundary delineation methodologies, even with the same definition, and in some cases they may apply the same delineation methodology differently.

The Conservation Foundation, Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum 37 (1988). This is precisely the problem with the Corps' and EPA's implementation of the §404 program. They have not agreed on a test method for determining the existence and extent of wetlands despite the fact that they use the same regulatory definition. A recent study by the General Accounting Office characterizes the differences in the delineation methods of the Corps, EPA and other agencies as "fundamental" and further notes that the different approaches "can result in wetlands determinations that vary by thousands of acres" for the same area.[2] After a property owner receives a jurisdictional determination or otherwise knows with assurance that the property is covered by the Clean Water

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[2] United States General Accounting Office, WETLANDS, The Corps of Engineers' Administration of the Section 404 Program, Report to the Chairman, Subcomm. on Investigations and Oversight, Comm. on Public Works and Transportation, House of Representatives (Washington, D.C.: GAO/RCED-88-110, July, 1988) at 23, 33.

Act ("CWA"), 33 U,S.C. §§1251 *et seq.* (1982), the property owner must then apply for a §404 permit.

B. Project Planning, Land Acquisition And Real Estate Finance Practices

A basic understanding of project planning, land acquisition and real estate finance practices is required to comprehend the mass confusion created within the diverse community of potential §404 applicants by EPA's new market entry theory. These practices are required of the regulated community by lenders and other project investors as well as the pressures of free market forces and competition.

The project planning, land acquisition and finance process is complex and risky. Although the "industry" that these *amici* represent is comprised of diverse businesses that operate in distinctly varied economic and market settings, every member shares the need for reasonable predictability. Predictability is the key to profitability. The ability to accurately assess all of the economic and market forces as well as the applicability and effect of regulations that dictate project planning and design separates the successful and profitable enterprise from the unsuccessful.

1. Preliminary Steps

Potential §404 applicants do not use a single process for planning projects, acquiring land and financing these activities. However, some generalized stages of these processes can be outlined.

As a first step, many potential §404 applicants conduct a market study. Market research and analysis provide a framework that helps determine the anticipated absorption of the applicant's product. "The absorption period refers to the amount of time it will take to sell out or lease up a real estate project." NAHB, Land Development 26 (1987) (hereinafter cited as Land Development). Conducting market studies *before project planning* is necessary to maximize the opportunities to increase site-specific absorption, otherwise known as market capture. This market capture

occurs only "when a project is designed specifically for its given marketplace," *Id.* at 17, which necessarily cuts down on potential locations where the specific product can be placed.

Market research identifies the characteristics of various products already on the market, characteristics of the local population, economic forces and consumer information, and is also used to conduct a competitive audit that will yield information on what competitors in the market place are or will be doing. The project proponent will use this analysis of the market to narrow down the geographic area where the project can be placed.

Once a business identifies a market that it believes it can capture, it can then proceed to the next stage in the planning process and evaluate project feasibility. The feasibility analysis determines whether threshold conditions can be met and the cost of meeting those conditions. Considerations here include the availability of infrastructure needed to support the project, comparability of the existing and prospective zoning and other ordinances with possible plans, site and project relationship to existing neighborhoods, land improvement time and site sensitive features (e.g., drainage, soils, stability problems, topography requiring extensive earth moving and obvious wetlands) that can be mapped from available data such as tax maps, zoning maps and United States Geological Survey and Soil Conservation Service maps. *Id.* at 30-39. This information leads to the creation of a schematic plan (not a site plan) that determines lot yields, profitability and a decision on whether to proceed further with planning.

Everything up to this point must be done with discretion. The premature disclosure of plans for a project may either alarm surrounding landowners before an opportunity arises to present the project's advantages, or it may raise surrounding land prices high enough to prohibit purchase. *Id.* at 32-33. It would also inform competitors, who may be conducting similar efforts to meet the same market demand, of the potential applicant's plans. The objective

at this point is to determine whether a potential site is feasible enough to warrant further, detailed investigation of a site and the preparation of a site plan.

2. Site Analysis

The project planning process begins long before a potential §404 applicant can evaluate the applicability of the §404(b)(1) guidelines. Frequently the potential applicant considers more than one site during the feasibility analysis. However, the possible future applicant will not have prepared any plans in sufficient detail to determine precisely where land grading and other work will occur and thus whether jurisdictional wetlands, if any, will need to be touched.

Only after a feasibility analysis determines that a site is reasonably compatible with a proposed project and the possible applicant has a general idea of the site, does a project planner initiate a detailed site analysis. *Id.* at 39. This is the stage where natural and man-made environmental conditions on or affecting the site are examined. As much information as possible must be gathered before approaching the owner or a real estate agent to avoid premature disclosure of plans, but if all information obtained warrants further action acquisition plans may need to be revealed.

At this point the site may have to be controlled, by obtaining an option to purchase or some other method, to conduct the necessary detailed engineering and on-site analyses, including an accurate determination of wetland boundaries, required to produce a functionally, environmentally and socially appropriate physical site plan. Also, "[a]n option permits the latitude to secure the necessary zoning and other approvals." *Id.* at 97. See NAHB, Financing Land Acquisition and Development 57-58 (1987) (hereinafter cited as Financing Land Acquisition); R. Lewis, Land Buying Checklist viii (3rd ed. 1988). It is at this stage where the project proponent conducts the planning process at the level of detail needed to evaluate the applicability of the §404(b)(1) requirements.

3. Project Financing

Once all of these studies have been completed, the project proponent must still be willing to incur the substantial risk involved in proceeding with its project. If the decision is made to proceed, all the data must be submitted in appropriate form to lenders, joint venture partners or other investors. These people and institutions need assurance that the project is physically and financially viable. They often require an independent market analysis that provides an objective third-party opinion of the project's feasibility. It can be extremely difficult to obtain financing for land acquisition and development because of the high degree of risk. A loan application must be put together that meets the project's financial needs and is attractive to lenders. Financing Land Acquisition, *supra* at 59; Land Development, *supra* at 99.

4. Market Entry

This general outline of project planning, land acquisition and finance practices is a very simplified model. In most situations, it will be impossible to define a precise point in time when a project proponent enters a market. In discussing the questions left unanswered by EPA's market entry theory and this case, the lead federal counsel in the District Court, *Bersani v. EPA*, 674 F. Supp. 405 (N.D.N.Y. 1987), noted that "[m]any projects go through extensive changes in purpose, size, design, and location. It may be quite difficult to define the purpose of a project which may have gone through many changes. Similarly, the complex nature of land transactions makes it very difficult to know what is an alternative site and when it can be acquired." Liebesman, The 'Sweedens Swamp' Controversy - Focusing on EPA's Role in the Clean Water Act §404 Program, 9 Nat'l Wetlands Newsletter 15, 17 (Nov.-Dec. 1987).

Even the simplified model above does not apply to many potential §404 applicants. Some potential applicants have owned land since before promulgation of the final §404(b)(1) guidelines in 1980, 45 F.R. 85,335 - 57 (Dec. 24, 1980), or even before enactment of the Federal Water Pollution

Control Act in 1972, Pub. L. No. 92-500, 86 Stat. 816,884 (1972) (codified as amended at 33 U.S.C. §§1251 *et seq.* (1982). Also, most applicants, who are entrepreneurs properly functioning in our free enterprise system, are always in the market for project sites and have not left the market since the creation of their businesses.

Some potential applicants will buy or hold property for long range business planning purposes but without any notion of what projects they will propose for a particular site at some indefinite point in the future. Other prospective builders and possible §404 applicants speculate about the project potential of property and buy land when the costs are relatively low, creating the opportunity to provide a lower cost product to consumers, and increasing the chances of building a profitable project.

REASONS FOR GRANTING THE WRIT

The EPA's view of the law, as presented by its "market entry" theory, is unworkable and unreasonable. The attainment of worthwhile goals should not violate economic reality and common sense. The ends should not justify the means. Moreover, EPA's short-sighted, albeit zealous, attempt to protect wetlands is inconsistent with the important goals of the Clean Water Act.

Most home building and light construction in this country is performed by builders who may have no staff or employees. The vast majority of builders are small businesses. Most are not equipped to deal with such a standardless and vague regulation as represented by EPA's market entry theory. But even a well staffed large developer with substantial financial resources could reasonably miscalculate the supposed time of entry into a market. When a §404 permit application is filed two, three or more years after the applicant reasonably thought it "entered into the market" the EPA or the Corps could assert that the relevant market was really entered into a few months before the applicant assumed it did, and further assert that within those few months an alternative site was avail-

able and feasible. The applicant must somehow turn back the clock in its attempt to rebut the presumption of availability and gather often evaporated evidence to establish that the alternative site was not feasible for its intended project.

Even if an applicant could "enter a market" at some defined point in time, the market entry theory will force potential applicants to prematurely exert control over possibly many potential alternative sites in order to adequately evaluate them. This will expose an applicant's plans to competitors and to sellers, resulting in great increases in the cost of land and projects. The market entry theory throws all existing *and often required* practices of project planning, land acquisition and real estate financing into a black hole of absurdity.

This type of regulatory interpretation exceeds what could be reasonably expected as part of the cost of doing business in a regulated society. Compliance with this new regulatory policy is much more than just onerous. Compliance is impossible given the difficulty in establishing wetland boundaries and the necessary project planning processes that lead to the preparation of a physical site plan. An alternative and reasonable regulatory interpretation can provide a clear point in time to judge whether there are practicable alternatives and do justice to the Clean Water Act. The time a party files a permit application or, in the alternative, the time a potential applicant receives a jurisdictional determination that a proposed site has wetlands (whether before or after land acquisition) provides a definite point in time by which all concerned parties can evaluate practicable alternatives to potential adverse impacts on the wetlands.

The EPA's imposition of its market entry theory on §404 permit applicants has very serious consequences for project planning, land acquisition and finance practices, the provision of affordable housing and other structures and products required by society, and the necessity of good comprehensive land use planning by local and state gov-

ernments. Some degree of common sense is now desperately needed in the national wetland protection effort. The seriousness and immediacy of this new problem concerning an important question of federal law warrant the exercise of this Court's power of supervision.

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE EPA'S NEW AND UNREASONABLY BROAD THEORY OF PRACTICABLE ALTERNATIVES IS MEANINGLESS TO PERMIT APPLICANTS, IGNORES THE REAL WORLD AND WILL BE DETRIMENTAL TO SOCIETY

A. The Undefinable Nature Of "Market Entry" Creates A Likelihood Of Unbridled Agency Discretion And Fails To Provide Potential Applicants Any Meaningful Guidance To The Conduct Of Their Affairs

The unreasonably broad agency discretion that the market entry theory creates has caused widespread confusion within the regulated community. Despite EPA's inept attempt at restricting the future use of its market entry theory,[3] the vast community of possible §404 applicants does not know how to conduct its affairs and meet its regulatory obligations because it has no idea what market entry means. Also, by establishing this market entry theory, the "EPA likely will exercise its section 404(c) veto authority with greater frequency than it has in the past." Steinberg and Dowd, *Economic Considerations In The Section 404 Wetland Permit Process*, 7 Va. J. Nat. Resources L. 277, 297 (1988). Of course, we do not contend that there is anything wrong with EPA exercising its authority, if it sustains its burden of proof, to prohibit unacceptable adverse impacts to the aquatic environment. But with "market entry" at its side, "it will become more difficult for applicants to predict in the initial planning stages of a project what EPA, in subsequent years and with the

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[3] EPA Final Determination of the Assistant Administrator for External Affairs, n.14 and accompanying text (May 13, 1986), reprinted in the Pet. for Cert. at 93a (hereinafter cited as Final Determination).

benefit of hindsight, might consider to be practicable alternatives in a section 404(c) veto proceeding." *Id.*

Considering that the time period over which a project's evaluation and planning is conducted can vary from days to years, the EPA has created a theory that allows itself (or any Corps district or division engineer)[4] to fix market entry at virtually any point it chooses. The time of entry into a market for a particular project is an undefinable concept. At best, the time of entry into a market could spread over several years, depending on the way a particular property owner conducts its affairs, the various constraints and requirements of market forces, lenders and investors and the wide range of possible yet reasonable interpretations of "market entry." Market entry could reasonably mean anytime between a project's initial conception in an individual's imagination to the filing of a §404 permit application. This market entry "window" could be extended even further forward in time up to the point of a final decision on alternatives by the EPA pursuant to its §404(c) veto authority or further back in time to the point of creation of the applicant's business. The members of these *amici* looking for guidance on how to conduct their affairs peer through this market entry window and see a meaningless panorama.

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[4] The Corps is composed of four levels of authority: district engineers, division engineers, the chief of engineers, and the Secretary of the Army.

. . . .

> The Corps is 'highly decentralized.' Throughout the United States, there are thirty-six district engineers and eleven division engineers. The applicant may not appeal a permit decision made by the district or division engineer. See [33 C.F.R.] §320.1(a)(2)(1987).

Lawson, *The Corps Of Engineers' Public Interest Review Under Section 404 Of The Clean Water Act: Broad Discretion Leaves Wetlands Vulnerable To Unnecessary Destruction*, 34 J. Urban & Contemp. L. 203, 212 n.50 (1988).

The very real possibility of EPA choosing an initial market analysis as the point of market entry makes no sense in the regulated community since at that planning stage the applicant had not decided nor was it capable of deciding whether it would acquire land in the community or even if the project could be built profitably. But EPA could hold the applicant accountable for having evaluated the practicability of each and every possible site in some undefined "alternatives" region where the project might be constructed.

The confusion is compounded for those potential applicants who have owned property for years or who buy property on speculation without a specific project in mind. Also, since the Second Circuit stated, following EPA's argument, that Pyramid Companies "should be held to stand in its predecessor's shoes," *Bersani*, 850 F.2d at 41, the applicant's window of "opportunity" to look for practicable alternatives can be extended indefinitely into the past. Why did the Second Circuit or EPA stop with Pyramid's immediate predecessor, DeBartolo? DeBartolo had a predecessor as well. In fact, "[e]fforts to build on Sweeden's swamp began in February, 1979," *Citizens For Responsible Environmental Management v. Attleboro Mall, Inc.*, 400 Mass. 658, 660, 511 N.E.2d 562, 564 (1987), which was before the promulgation of the final §404(b)(1) guidelines in 1980. Does this mean that all permit applicants must look at what practicable alternatives existed in 1980 for their current projects? Or will EPA require even a further retroactive application of its new theory and look to the 1970's or beyond? How, by any notion of common sense, can this type of standard be "specific enough to put a developer on notice of when it should be considering alternative sites[?]" *Bersani*, 850 F.2d at 46.

B. The Uncertainty Enveloping The Implementation Of The Market Entry Theory Will Require All *Potential* Permit Applicants To Prematurely Secure Purchase Options On Multiple Tracts Of Land, Resulting In Great Increases In The Cost Of Projects Required By Society

Assuming an applicant could "enter a market" at a specific point in time for a potential site that will satisfy the needs and purpose of the applicant's proposed project, EPA still has a blind view, endorsed by the Second Circuit, of project planning, land acquisition and real estate finance practices. The various elements of these practices are necessary to deliver quality products at the lowest possible price to society. By abandoning an understanding of this reality, the EPA has failed to consider relevant factors in applying the alternatives analysis. The inequities in this theory must be corrected if the balance between environmental and economic values envisioned in the CWA is to have any meaning.

The market entry theory would have the applicant combine its initial narrowing search for a feasible site with application of the alternatives test. This forces the potential applicant to obtain options on or otherwise tie-up the sites that will be the subject of the permit application and the alternatives analysis in order to adequately evaluate whether all sites are truly alternatives (i.e., to determine actual wetland boundaries and preserve the true availability of the site) . Under the Second Circuit's rationale, *all* property, presumably within a given radius of the applicant's proposed site or region surrounding that site, would be "arguably available" for purposes of the regulation. *Bersani*, 850 F.2d at 41. This is so because in EPA's view an applicant could have simply bought the rights to a prime alternative site from a competitor, regardless of whether the site is actually on the real estate market. The EPA has expanded the commonly accepted and understood meaning of available property into a realm of irrational thought.

The cost of all the options or similar controls over the sites would have substantial and adverse financial impacts

on the project. However, the actual cost of all the options to purchase would only be the beginning of the financial impact on §404 applicants. Since it would be impossible to conceal the potential applicant's activities from competitors or the current owners of the potential sites, the recognition of a demand in the market would drive up land prices, possibly beyond the project's feasibility, but definitely at the expense of needlessly adding to the cost of delivering the project to the public.

The market entry theory forces the applicant to make commitments and take a substantial financial risk by purchasing an option for a site far too early in the project planning process and well before the applicant or its investors are ready to take that risk. Under the theory, applicants must evaluate sites well before they have developed or could develop any type of physical site plan. Without making a significant investment in the preparation of a physical site plan, and preparing one for each possible site, an applicant does not know if the project will even require a permitted fill. Although EPA would assert that the Corps' and its own boundary delineation methodologies are not binding, that merely adds to the uncertainties for potential applicants. The market entry theory forces applicants to prematurely look for other sites when, after receiving a jurisdictional determination, the applicant could simply avoid adverse impacts on the aquatic environment by redesigning its site plan.

This new "market entry" theory also significantly decreases the predictability of project and land acquisition plans and thereby greatly increases the financial risk to the 404 applicant. Without any guidance from the agencies or the courts, how is an applicant to know if the Corps engineer or EPA Regional Administrator will agree on the applicant's guess about the particular site it finally chooses for its project? The increased financial risk will exclude access to lenders and investors for all project proponents except those few with the very best track records or those with very small projects.

In order to do justice to the practicable alternatives analysis and particularly the question of availability of alternative sites, two watershed events must occur. First, an applicant needs to reach the stage of physical site plan preparation for the intended project and, second, must acquire definitive knowledge about wetland boundaries. The market entry theory requires an alternatives analysis well before the confluence of these two common sense prerequisites.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY IS FUNDAMENTALLY INCOMPATIBLE WITH THE PRINCIPLES OF COMPREHENSIVE LAND USE PLANNING AND IN PRACTICE CAN VITIATE A COMMUNITY'S EXPRESSION OF WHAT DEVELOPMENT IT WANTS

Land use planning and land use and environmental controls are inextricably intertwined, and are necessarily so if rational provision is to be made for the use of land on a basis that benefits the community as a whole and is consistent with the reasonable interests of individual property owners. However, EPA's market entry theory clashes with the practice of land use and urban planning because it fails to recognize that the comprehensive planning process looks toward the future.

One of the principal objectives of a community's comprehensive plan is to express what the community wants to be at some specified point, typically five, ten or twenty years, in the future. Fundamentally, it is a physical plan and statement of community policy that "translates values into a scheme that describes how, why, when, and where to build, rebuild, or preserve the community." International City Management Association, The Practice Of Local Government Planning 60 (2d Ed. 1988). The vision of the plan is pursued through a variety of implementing zoning ordinances, subdivision regulations and numerous other ordinances that regulate such issues as stormwater runoff, the provision and construction of infrastructure and natural resource protection.

A comprehensive plan provides both the public and private sectors a rational basis from which to judge a proposed project's appropriateness and feasibility. A project proponent's ability to obtain state and local approvals and permits is determined by the project's compliance with the existing plan and its current implementing ordinances, regardless of when land was acquired.

In contrast, the conditions EPA looks at concern when a particular permit applicant entered the market for its project. When an applicant purchased a site, took an option on a site, hired a market analyst or performed some other similar but as yet undefined factor, are factors wholly unrelated to whether a particular project will fit the community's plan. These conditions are irrelevant from a land use planning perspective. The market entry theory runs counter to land use planning goals when land use and environmental regulations should work to effectuate those goals.

EPA apparently does not recognize as a relevant factor the zoning on an alternative site at the time EPA determines that an applicant entered the market. Only through hindsight could EPA know that the zoning on the North Attleboro site would change due to the efforts of New England Development. See Final Determination, *supra*, reprinted in Pet. for Cert. at 90a. The market entry policy could then require an applicant to seek rezonings, zoning variances, special permits or exceptions or other changes to the comprehensive plan. If a community needs the particular project for economic development, housing or other purpose to promote the public health, safety and welfare it will be forced to rewrite its comprehensive plan and implementing ordinances to accommodate EPA's view of where a project should go. By doing this, the EPA has potentially destroyed the hope of local communities of effectively implementing their comprehensive plans and associated land use controls. The ramifications of this type of federal second guessing could be disastrous.

While at times it will be necessary for the federal government to override local and state plans because of im-

portant national concerns, such as environmental preservation, the wholesale detraction of a community's land use ideals on irrelevant grounds should be prohibited by this Court.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE MARKET ENTRY THEORY WILL LEAD TO ILLOGICAL AND INEQUITABLE DECISIONS AND IS UNNECESSARY TO PROMOTE WETLAND PROTECTION

The EPA claims that the market entry approach is necessary to carry out the purpose of the CWA. That is, it will force property owners to make decisions to protect wetlands before they commit to a particular site. Assuming for argument's sake that a definite time could be established for entry into a relevant market, an analysis of alternative sites at that time could show that there are no alternatives (i.e., the applicant expends substantial resources in evaluating and proving that other sites are either not available or not feasible, rebutting the presumption of practicable alternatives). However, by the time the applicant is ready to apply for a §404 permit an alternative site could become available or feasible for the project.

In the real world, alternatives come and go all the time. The boundaries of wetlands change over time as well. There may actually be more alternative sites at the time of permit application. Presumably, EPA would then argue that it can also use the time of permit application to analyze practicable alternatives, Pet. for Cert. at 22 n.16, forcing the applicant to again perform an expensive feasibility analysis of the new potential alternative site.

The whole purpose of an applicant's elaborate market analyses, feasibility studies and site analyses is to reduce the inherent risk in the real estate development business. Market forces and competition impose a substantial financial incentive on applicants to limit risk. Anyone that does not heed those natural incentives will shortly go out of business. Avoidance, if possible, of either economic or environmental conditions adverse to a project will always be

an applicant's preferred course. But the Second Circuit says, "[w]hether most real-life developers would take such a risk is irrelevant." *Bersani*, 850 F.2d at 44. How can a reading of the Clean Water Act and the §404(b)(1) guidelines meet the requirements of common sense when that interpretation expressly ignores reality?

The market entry theory also creates anomalous results, as demonstrated by a slightly revised hypothetical factual setting. Here, according to EPA the North Attleboro site was available to Pyramid before New England Development (NED) bought it. However, if Pyramid had bought it first, as EPA's market entry theory requires, and NED then pursued a project on Sweedens Swamp, would EPA's theory then submit to an assertion by NED that the Sweedens Swamp site has no practicable alternative and, therefore, let NED proceed to the next step in the permitting process? Presumably not. EPA would assert that the North Attleboro site was available to and feasible for NED when it entered into the market. The paradox for Pyramid, NED or any other latecomer who could build a viable project is glaring. How can *one* site be a practicable alternative to two competing businesses at the same time? Before this case, denying a §404 permit on this basis was beyond plausible argument.

The imposition of this unreasonable market entry theory is unnecessary to protect wetlands and further the purposes of the CWA. If the applicant rebuts the presumption that there are practicable alternatives, the Corps still can deny a permit if the discharge of dredge or fill material "will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. §230.10(c) (1987). If the Corps issues a permit after its extensive review process, the EPA then can, under its §404(c) veto authority, prohibit a permit by asserting that the proposed dredge or fill activity "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. §1344(c)(1982).

Of course, EPA when acting under §404(c) has the burden of proving "unacceptable adverse impacts," *Bersani*, 850 F.2d at 40, a burden EPA abrogated in this case by asserting that EPA has proven its position on unacceptable impacts because the applicant has failed to prove its position, pursuant to §404(b), on alternatives. The EPA's argument presents a striking incongruity. If the existence of an alternative makes the environmental impact on a site unacceptable, does the lack of an alternative transform the impact into an acceptable one? How can the agency measure the actual environmental impact on a wetland environment by examining what someone could do on an unrelated upland site?

Section 404(c) is intended to protect environmental interests. It acts as an environmental safety check on the permitting process. Therefore, EPA under §404(c) could properly consider the Corps' environmental judgments related to "significant degradation," 40 C.F.R. §230.10(c)(1987), or on "appropriate and practicable steps" to mitigate potential adverse impacts. 40 C.F.R. §230.10(d)(1987). But §404(c) does not authorize reconsideration of fundamentally nonenvironmental judgments made by the Corps, as was done by EPA in this case. The EPA is an environmental agency and has little or no expertise in the economic matters that are impinged by its market entry theory.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari filed by Bersani, et al., this Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

WILLIAM H. ETHIER
NATIONAL HOUSING CENTER
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359
Counsel for Amici

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